NO. 79-1701

Supreme Court, U.S.
FILED
APR 28 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

_____ TERM, 1980

EDWIN GRANT HAMILTON,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

D. FRANK KAMPFE
201 South Broadway
Drawer U
Red Lodge, Montana 59068
ATTORNEY FOR PETITIONER

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Questions Presented	3
Statement Of The Case	3
Reason for Granting Writ	9
The Montana Supreme Court Erred When It Held That Giving The Jury Instruction, "The Law Presumes That A Person Intends The Ordinary Consequences Of His Voluntary Acts" Was Harmless Error Under The Facts Of This Case	
Conclusion	14
Appendix A	1A
Appendix B	24A
Appendix C	26A
Appendix D	27A

CITATIONS

Cases:

Chapman v. California 13
386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824

Harrington v. California 13
395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726

In Re Winship 10, 13
37 U.S. 358, 25 L.Ed. 2d 368, 90 S. Ct. 1068

Sandstrom v. Montana 8, 9, 10
_____ U.S. _____, 61 L. Ed. 2d 39, 99 S. Ct. 2450

State v. Hamilton 2, 10
_____ Mont. _____, 605 P. 2d 1121
37 St. Rep. 70
Ulster Co. v. Allen 10
_____ U.S. _____, 60 L. Ed. 2d 777, 99
S. Ct. 2213

Statutes:

28 U.S.C. §1257 (3) 2
§94-5-102 Revised Codes of Montana, 1947 ..... 5, 9
§94-5-103 Revised Codes of Montana, 1947 9
United States Constitution Amendments XIV 2

In the Supreme Court of the United States

_____ TERM, 1980

NO._____

EDWIN GRANT HAMILTON,

Appellant,

v.

EDWIN GRANT HAMILTON,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

EDWIN GRANT HAMILTON, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Montana entered in the above entitled case on January 30, 1980.

OPINIONS BELOW

The opinion delivered in the Supreme Court of the State of Montana in *State v. Hamilton* is reported in _____ Mont. _____, 605 P 2d 1121, 37 St. Rep 70 (1980). A copy of the opinion appears in Appendix A to this petition, at page 1A. The Judgment of the Supreme Court of Montana is printed in Appendix B hereto, infra page 24A. The Journal Entry of Judgment of the District Court of the Thirteenth Judicial District of the State of Montana is printed in Appendix C hereto, infra page 26A.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final order sought to be reviewed was made and entered by the Supreme Court of Montana on the 30th day of January, 1980. The jurisdiction of the Supreme Court of the United States is invoked pursuant to the statutory provision, 28 U.S.C. § 1257 (3) which confers on this Court the ability to review and decide any title, right, privilege or immunity specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities

> of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)

QUESTION PRESENTED

Did the Montana Supreme Court err when it held that giving the jury instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts," was harmless error under the facts of this case?

STATEMENT OF THE CASE

On February 12, 1978, the dispatcher for the Carbon County Sheriff and Red Lodge Police Departments received a telephone call at 6:26 p.m.. The dispatcher answered the phone, "This is the Red Lodge Police Department," but received no response. As she listened, the dispatcher heard arguing in the background and testified: "To me it sounded like a couple of drunks arguing." (R 193) She told a police officer standing nearby that, "This sounds like we have got a fight." The dispatcher turned the phone over to the officer after she heard a male voice say, "You tried to call the goddamned cops on me." The police officer listened to the phone for over one-half an hour. He heard over the telephone what sounded like a struggle between a male and a female (R 225) After hearing what sounded like a female gasping for air and choking, the officer began to write down the intelligible words and sentences he heard. He heard the following statements over the phone:

> "Goddamn it, die. I am going to hell. Mamma, I am sorry. You all right, mamma, huh? No, no, no,

mamma. I love you. Mamma, mamma, mamma. Like hell I am. I have never done this in my life. Now I have got to find my glasses. Mamma, mamma. Die, you bitch. Goddamn it, die. Are you going to die or not? Die, damn it. I am going to hell, mamma." (R 229)

The officer continued listening to the telephone and heard what sounded like someone dialing the telephone on the other end of the line. The male voice then said, "Hang the goddamn phone up, I have to call my cousin. My mother is dead. She had a heart attack." (R 230) The officer asked the name and address of the person on the other end of the telephone line. The individual identified himself as GRANT HAMILTON of 207½ North Platt, which was a block away from the police station. The officer left immediately for that address.

In the meantime, a sheriff's deputy who had been advised of the location arrived at 207½ North Platt where he found the Petitioner, EDWIN GRANT HAMILTON, age 54, very upset without his glasses on. EDWIN GRANT HAMILTON had a wound on the top of his head and bruises and scratches on his face. The deputy saw the upper portion of a body lying face down on the floor near the doorway between the living room and the bedroom. He checked for vital signs, but could find none. The body was that of Mable Johnson, HAMILTON'S seventy-five year old mother with whom he had shared the premises.

Shortly thereafter, the police officer who had been listening on the telephone arrived at the house and futilely checked for vital signs. A few minutes later, the Carbon County Sheriff arrived, placed Petitioner under arrest and took him into custody.

After he was taken into custody, the Petitioner repeatedly asked to have his glasses. (R 104) He also stated he had

been drinking a considerable amount of alcoholic beverages. At approximately 9:30 p.m. on February 12, 1978, three hours after the phone call, the sheriff took Petitioner to the Carbon County Memorial Hospital where a blood sample was withdrawn from EDWIN GRANT HAMILTON. The blood alcohol report was received in evidence at trial and showed .19 alcohol content. (R 98 and R 613)

On February 16, 1978, an Information was filed by the Carbon County Attorney. The Information alleged that EDWIN GRANT HAMILTON had committed the crime of deliberate homicide, contrary to §94-5-102, Revised Code of Montana, 1947, having purposely or knowingly caused the death of Mable Johnson by strangling or beating.

On September 11, 1978, EDWIN GRANT HAMILTON was brought to trial. He took the witness stand in his own behalf and testified to the fact that he is an alcoholic with a long history of alcoholism and has had numerous alcoholic blackouts. (R 439, R 441) Testimony was given by a psychiatric social worker that the American Psychiatric Association recognizes alcoholism as a disease as well as a mental defect. (R 471)

Evidence was presented at trial that the relationship between GRANT HAMILTON and Mable Johnson was not a normal mother-son relationship. (R 381) Testimony indicated that the deceased was the dominant party in a bizarre mother-son relationship between the deceased and the Petitioner. (R 358, R 367) The Petitioner also presented testimony that Mable Johnson had slapped him with her hand on several occasions. (R 394)

Petitioner testified that over the years he left Red Lodge, Montana, time and time again, but always returned because his mother was there. Defense witness, Ned N.

Tranel, Ph. D., a clinical psychologist, characterized Mr. Hamilton as having a pathologically symbiotic relationship with his mother. He explained the relationship as an unhealthy interdependence, in which one party could not exist with his emotional or psychological integrity without the other party. (R 503) Dr. Tranel characterized Mrs. Johnson as a schizophrenogenic parent: One who is domineering and cold, excessively overprotective, and has a double bind characteristic. A double bind characteristic is one in which a person sends conflicting messages, behaving in one way toward a person, but feeling another way, i.e. outwardly encouraging the child's independence, but fostering a dependence by the way the child is treated. (R 504-506)

Dr. Tranel stated that EDWIN GRANT HAMILTON was under a chronic and continual form of severe stress caused by the schizophrenogenic parent and accompanied by a continual assault on the integrity of his personality functioning. Dr. Tranel said:

> "He (Hamilton) perceived threat in that stress pattern and he attempted to cope with it over the years by extracating himself, by getting himself out of the stress pattern. He repeatedly made attempts to do that, but because of this symbiotic , pathologically sumbiotic relationship with his mother, he would then have to return to her and look again to her for sources of comfort and support." (R 507)

Dr. Tranel also testified that Petitioner was living in a world of severe perceptual distortion, meaning that he was unable to accurately integrate information that he got through the different sense modalities. In other words, MR. HAMILTON would not be able to integrate the cues coming from his different senses. Dr. Tranel testified that if during a struggle with his mother, Petitioner lost his

glasses and was struck by her with an object, such a perceptual distortion could occur as to cause fear and panic and the inability to accurately ascertain or assess the severity of the threat that was presented to him.

Dr. Tranel testified as follows:

> "Q.***if Grant had been verbaly accosted by his mother, and his mother then threatened to place him in jail, and then Mr. Hamilton was struck by a telephone in the head, could he have reasonably been placed in fear of imminent danger?
>
> A. Oh, yes. He would have perceived that as the severe threat or the threat as the anticipation of harm because of the previous conditions that I described.
>
> Q. Under those same conditions could Mr. Hamilton have reasonably been placed in fear for his life?
>
> A. Yes, at that point he would have likely concluded that the impending threat required a defensive reaction on his part in order to preserve his integrity.
>
> Q. Could he have reasonably believed that it was either he or the aggressor at that time?
>
> A. Oh, yes." (R 513-514)

After the presentation of the evidence, jury instructions were given. One of the instructions given to the jury was:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

Defense counsel made his objection to the instruction as follows:

> "Mr. Kampfe: Comes now the defendant and objects to Plaintiff's Proposed Instruction No. 12 in that nowhere in the Montana Criminal Code is a statement that says that you can presume what that offered instruction says; that is in violation of the requirement that the State must prove by competent evidence each and every material allegation and here there is a presumption that would not require the standard test of beyond a reasonable doubt."

The Court gave the instruction despite defense counsel's objection. (R 578-579)

The jury returned a verdict of guilty of mitigated deliberate homicide on September 14, 1978. (See Appendix C) Thereafter, on September 28, 1978, HAMILTON was sentenced to a term of imprisonment in the Montana State Prison for thirty-five years.

From that judgment, Petitioner appealed his conviction to the Montana Supreme Court. The cause was argued and submitted to the Montana Supreme Court for decision on June 5, 1979, and taken under advisement. Thereafter, on June 18, 1979, the United States Supreme Court rendered a decision in the case of *Sandstrom v. Montana*, _____ U.S. _____, 61 LEd at 39, 99 S. Ct. 2450, which held the instruction that "The law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutional, and reversed the conviction. The Montana Supreme Court determined that further argument was necessary in light of the *Sandstrom* case. (See Per Curium Order, Appendix D) The parties filed additional briefs and additional oral argument was presented to the Montana Supreme Court on October 29, 1979. The Montana Supreme Court's decision to affirm the lower court was made on January 17, 1980, and became a final order on

January 30, 1980 (See Appendix B)

REASON FOR GRANTING WRIT

THE MONTANA SUPREME COURT ERRED WHEN IT HELD THAT GIVING THE JURY INSTRUCTION, "THE LAW PRESUMES THAT A PERSON INTENDS THE ORDINARY CONSEQUENCES OF HIS VOLUNTARY ACTS" WAS HARMLESS ERROR UNDER THE FACTS OF THIS CASE

In light of *Sandstrom v. Montana*, _____ U.S. _____, 61 L. Ed. 2d 39, 99 S. Ct. 2450, (1979) and the facts the petitioner herein presented at trial, the Supreme Court of the State of Montana erred in holding that the jury instruction in question was harmless error. The Petitione was charged with deliberate homicide and found guilty of mitigated deliberate homicide under §94-5-102 and 94-5-103 respectively, of Revised Codes of Montana, 1947, each of which requires that the act of criminal homicide be committed knowingly or purposely. The jury instruction in question, Court's No. 13, "The law presumes that a person intends the ordinary consequences of his voluntary acts," eliminates the prosecution's burden of proving the essential element of intent beyond a reasonable doubt by creating either a conclusive presumption or a burden - shifting presumption. By taking the element of intent out of the jury's province, the Petitioner was deprived of his basic Constitutional protection of Due Process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The law was set out succinctly in *Sandstrom*, supra. The prosecution must prove beyond a reasonable doubt every

fact necessary to constitute the crime charged. (See *In re Winship*, 37 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, 51 Ohio OPS 2d 323 (1970). The effect the instruction had on a reasonable juror determines whether a defendant has been afforded his Constitutional rights. (See *Ulster County Court v. Allen*, _____ U.S. _____, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979). Holding the instruction unconstitutional, the Court said:

> "Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden - shifting presumption like that in *Mullaney*, or a conclusive presumption like those in *Morissette* and *United States Gypsum*, and because either interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional."
> _____ U.S. at _____, 61 L. Ed. 2d at 51, 99 S. Ct. at 2462

In *State v. Hamilton*, _____ Mont. _____, 605 P. 2d 1121, 37 St. Rep. 70 (1980) the Montana Supreme Court recognized that giving the instruction in question was constitutional error; however, the Court held it was harmless error. The facts of the case and the possible effect of the instruction on the jury do not substantiate the Court's conclusion of harmless error in giving the instruction.

The only disputed issue at Petitioner's trial was his state of mind, i.e. the element of purposely or knowingly. The element of the act, was not an issue, although the Petitioner could not remember committing the act. During the trial, it was shown that HAMILTON had a history of alcoholic blackouts. At trial, when defense counsel inquired of MR.

HAMILTON whether he killed his mother, the following answer was given:

> "Mr. Kampfe: Did you kill your mother, Grant?
>
> Edwin Grant Hamilton: So help me God, I don't know. I can't -- I knew it happened, I just can't believe I did. There is nobody there but us, but I just can't believe I done it. But I know it is so. And I know she is gone. I don't know. I don't know. If I did, it wasn't me." (R 447)

Testimony at trial established that Mable Johnson had a sharp and violent temper, by which she often victimized Petitioner. Petitioner could remember the events on the evening of February 12, 1978, up to a point. He related at trial that he had broken a favorite popcorn bowl of his mother's, and she had become irrationally angry. She threatened to call the police and when he tried to stop her, she hit him with the telephone receiver, which knocked his glasses off and caused a wound on the top of his head.

GRANT HAMILTON had spent the greater portion of his adult life in prisons, on non violent and in several instances, insignificant charges. The threat of jail to him was a very real and terrifying possibility. Mable Johnson kept her fifty-four year old son HAMILTON, on a proverbial leash, refusing to let him make his own decisions or live his own life. She had been known to slap him and scream at him in the presence of several persons. Much of her anger was directed at HAMILTON'S alcohol problem; although she would purchase alcohol for him and taunt him when she drank a beer.

Defense witness Ned N. Tranel Ph.D., a clinical psychologist, presented testimony that GRANT HAMILTON suffered from perception distortions. He testified that if HAMILTON, who is legally blind, lost his glasses, his

other senses would be affected and he would be unable to accurately perceive the realty of a situation. Dr. Tranel testified that fear and panic would completely distort HAMILTON'S sense of realty. Although HAMILTON'S mother, Mable Johnson, had slapped him in the past, she had never struck him with an object. The loss of his glasses with the resulting fear and panic, the striking of his head with a hard object, and the threat of jail could reasonably have placed HAMILTON in fear of imminent danger to his life. In Dr. Tranel's opinion, GRANT HAMILTON, in his fear and panic, with the background of his bizarre relationship with his mother, and under the deluding influence of alcohol, could have seen himself as fighting for his very existence.

Dr. Tranel further testified that Mable Johnson and GRANT HAMILTON had an unhealthy mutual dependence on each other that constituted a bizarre mother-son relationship. Because of the unhealthy dependence, no matter how many times GRANT HAMILTON left his mother's residence in Red Lodge, Montana, he would always return there.

Between Dr. Tranel's testimony and a social psychologist's explanation of GRANT HAMILTON'S alcoholic blackouts, the defense issue was exclusively that HAMILTON did not *knowingly* or *purposely* kill his mother. The act itself, was not in controversy. However, the instruction in question could lead a reasonable juror to believe that by his act, HAMILTON acted knowingly and purposely. Since the act itself was not in question the presumption of intent places an unconstitutional burden upon the Petitioner to show that the act was not done purposely or knowingly.

Moreover, because of that instruction, the jury could have discounted all of the testimony given by Dr. Tranel

and the alcohol expert. This essentially would have wiped out Petitioner's entire defense. Instead of the prosecution having to prove HAMILTON acted purposely and knowingly, the instruction allows such intent to be presumed by the very act. Shifting the heavy burden of proof of lack of criminal intent to Petitioner is in contradiction of *In re Winship*, supra, and cannot possibly constitute harmless error.

In order for a federal constitutional error to be held harmless, the error must not have contributed to the defendant's conviction, i.e. the Court must be able to declare that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). The Montana Supreme Court favors the view of harmless error expressed in *Harrington v. California*, 395 U.S. 250, 23 L. Ed 2d 284, 89 S. Ct. 1726 (1969). In *Harrington*, this Court looked at the probable impact of the error in question on the minds of an average jury. In *Harrington*, this Court said:

> "We admonished in Chapman, 36 US at 23, 17 L. Ed. 2d 710, against giving too much emphasis to 'overwhelming evidence' of guilt, stating that constitutional error effecting the substantial rights of the aggrieved party could not be considered to be harmless". 395 U.S. at 254, 23 L. Ed. 2d at 288, 89 S. Ct. at 1726

Certainly, it is a substantial right of a defendant to have the burden on the prosecution to prove every element of a crime beyond a reasonable doubt. The instruction could have created either a conclusive presumption or a burden-shifting presumption in the minds of the jurors, that by committing the act, Petitioner acted knowingly and purposely. Thus, there is more than a reasonable possibility that the instruction contributed to the conviction. Since

the instruction relieved the prosecution from proving one of the elements of the crime, giving it to the jury deprives the Petitioner of his constitutionally guaranteed right of Due Process of law and cannot possibly be considered harmless error.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

DATED and SIGNED this 21st day of April, 1980.

D. FRANK KAMPFE
Attorney at Law
201 South Broadway
Drawer U
Red Lodge, Montana 59068

APPENDIX A

No. 14677

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1979

STATE OF MONTANA,
Plaintiff and Respondent,

vs

EDWIN GRANT HAMILTON,
Defendant and Appellant.

Appeal from: District Court of the Thirteenth Judicial District, Honorable Robert H. Wilson, Judge presiding.

Counsel of Record:

For Appellant:
D. Frank Kampfe argued, Red Lodge, Montana
Sally Johnson argued, Red Lodge, Montana

For Respondent:
Hon. Mike Greely, Attorney General, Helena, Montana
Sheri Sprigg aruged, Assistant Attorney General, Helena, Montana
Pablo Perhacs, County Attorney, Red Lodge, Montana
Arthur Ayers argued, Red Lodge, Montana

Submitted: June 5, 1979
Decided: January 17, 1980
Filed: January 17, 1980

Mr. Chief Justice Frank I. Haswell delivered the Opinion of the Court.

Edwin Grant Hamilton appeals from his conviction by a jury in Carbon County of the crime of mitigated deliberate homicide. This Court heard oral argument upon the matter on June 5, 1979. On June 18, 1979, the United States Supreme Court decided the case of Sandstrom v. Montana (1979), 442 U.S. _____, 99 S. Ct. 2450, 61 L Ed 2d 39. The *Sandstrom* case was decided before this Court had decided the present case. Upon our review of the record in the present case we determined that further argument was necessary in light of the Sandstrom case, because neither party addressed this issue in the original hearing. Additional briefs were filed by the parties and oral argument was again presented to this Court on October 29, 1979. This second hearing was limited solely to the *Sandstrom* issue. The following decision disposes of the issues raised in both the October and June hearings.

At 6:26 p.m. on the evening of February 12, 1978, the weekend dispatcher for the Carbon County sheriff and Red Lodge police departments answered a telephone call. Her greeting "This is the Red Lodge Police Department" received no response. Rather, she overheard what sounded to her "like a couple of drunks arguing." She stated to a police officer standing nearby that "this sounds like we have got a fight." She then heard a male voice say "You tried to call the goddamn cops on me." The dispatcher then turned the phone over to the officer.

For approximately the next half hour, the police officer listened through the phone to the events occurring at the source of the call. He heard what sounded like a struggle between a male and female. There was scuffling and a female voice calling for help. After hearing what sounded like the female gasping for air and choking, the officer began to write down the intelligible words and sentences he could make out. He recorded the following phrases spoken at intervals by the male voice:

> "Goddamit, die. I am going to hell. Mamma, I am sorry. You all right, Mamma, huh? No, no, no, Mamma. I love you. Mamma, Mamma, Mamma. Like hell I am. I have never done this in my life. Now I have got to find my glasses. Mamma, Mamma. Die, you bitch. Goddamnit, die. Are you going to die or not? Die, Damnit. I am going to hell, Mamma."

As the officer continued listening, he heard what he thought was someone dialing the telephone on the other end of the line. The male voice then spoke into the receiver: "Hang the goddamn phone up, I have to call my cousin. My mother is dead. She had a heart attack." The officer inquired as to the party's name and address. The individual identified himself as Grant Hamilton of 207½ North Platt, a location only a block away from the police station.

When a sheriff's deputy who had been advised of the location arrived there minutes later, he found defendant, 54 year old Edwin Grant Hamilton, with bruises and scratches on his face and a trickle of blood from a wound on the top of his head. Lying face down on the floor near the doorway between the living room and a bedroom was the body of Mabel Johnson, defendant's 75 year old mother with whom he shared the premises. She had been manually strangled to death.

Shortly thereafter, the police officer who had been listening on the phone arrived at the scene, and a few minutes later the Carbon County sheriff also arrived. The sheriff placed defendant under arrest and took him into custody. The police officer and deputy sheriff then proceeded to take photographs of the interior of the house and gather

physical evidence. The officers had no search warrant and had not asked defendant's permission to search the premises.

On February 16, 1978, an application for leave to file information was filed by the county attorney of Carbon County, alleging that defendant had committed the crime of deliberate homicide. Counsel for defendant objected that the affidavit accompanying the application failed to set forth probable cause, but the objection was overruled. On September 11, 1978, defendant was brought to trial. After the presentation of evidence instructions were given; one of the instructions given to the jury read as follows: "The law presumes that a person intends the ordinary consequences of his voluntary acts." This instruction was objected to by defense counsel. The jury returned a verdict of guilty of mitigated deliberate homicide. Defendant was sentenced to 35 years in Montana State Prison.

The defendant specifies six errors:

(1) Whether defendant was the victim of an illegal arrest?

(2) Whether the affidavit in support of the application for leave to file information was sufficient to establish probable cause?

(3) Whether the District Court erred in denying defendant's motion in limine to exclude evidence regarding the telephone call to the Carbon County sheriff's office?

(4) Whether the District Court committed reversible error in refusing to give defendant's offered instructions on negligent homicide as a lesser included offense?

(5) Whether the District Court committed reversible error in refusing to give defendant's proposed self-defense instruction?

(6) Whether the District Court committed reversible error in giving the instruction, "The law presumes that a

person intends the ordinary consequences of his voluntary acts."

We hold that the arrest was lawful and, consequently, the items of evidence garnered within the limits of the search incident to arrest were properly admitted.

Section 46-6-401(4), MCA, provides that a peace officer may arrest a person without an arrest warrant when "he believes on reasonable grounds that the person is committing an offense or that the person has committed an offense and the existing circumstances require his immediate arrest."

"Reasonable grounds" as used in this statute is synonymous with "probable cause". State v. Fetters (1974), 165 Mont. 117, 122, 526 P. 2d 122. "Probable cause to arrest without a warrant exists where the facts and circumstances *within the officer's knowledge and of which he had reasonably trustworthy information* are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." State v. Hill (1976), 170 Mont. 71, 74, 550 P.2d 390, 392.

"Evidence required to establish guilt is not necessary to prove probable cause." *Fetters*, 165 Mont. at 122. However, the mere fact that a defendant is present at the scene of a crime does not justify his arrest. State ex rel. Glantz v. District Court (1969), 154 Mont. 132, 139, 461 P.2d 193, 197. "There must be a showing of some connection with illegal or criminal activity by a defendant on the premises before there is probable cause to arrest him." State v. Lenon (1977), _____ Mont. _____, 570 P. 2d 1901, 34 St. Rep. 1153, 1156, citing State v. Hull (1971), 158 Mont. 6, 487 P 2d 1134.

"Where an officer reasonably believes that a person had in the past committed an offense, he may arrest the suspect without a warrant only where the existing circumstan-

ces require his immediate arrest. Where, however the peace officer reasonably believes that an individual is presently committing an offense, he may arrest that person at that time, whether or not the existing circumstances require his immediate arrest." *Lenon*, supra. 34 St.Rep. at 1153.

The foregoing authorities are the controlling case law in Montana on this issue. The defendant argues that his mere presence at the scene of the crime is not sufficient probable cause to justify the arrest. This is a correct statement of the law. *State ex rel. Glanz,* supra. The facts of this case, however, present more than "mere presence" at the scene of the crime. The police officers knew of the events overheard on the phone. The defendant was present with the corpse at the source of the call. The police arrived at the scene of the crime within minutes after the events were heard on the phone. The scratches on the defendant's face indicated that he had recently been involved in a fight. These events sufficiently constitute probable cause to arrest the defendant.

The language cited above from*Lenon* indicate that a warrantless arrest must be made only when the crime was committed in the officer's presence or that there are existing circumstances which require his immediate arrest. (Section 46-6-401, MCA, outlines other circumstances where a warrantless arrest may be made, but those circumstances are not presented in this case.) As a result, we are presented with a problem concerning the time element in the present case.

Defendant argues that the commission of the offense was in the past by the time the arrest was made and that the existing circumstances did not require defendant's immediate arrest because he "was not going anywhere and there was ample time in which to secure a warrant without losing any evidence or risking any personal danger to law

enforcement officers." However, "Knowledge of the commission of an offense in an officer's presence may be gained by him through a mechanical apparatus" and an offense is "deemed committed in the presence of the officer" so as to justify arrest without a warrant "when he hears the disturbance and proceeds at once to the scene." 6A C.J.S. Arrest §18. Even in the case of a misdemeanor, under statutes allowing warrantless arrest for offenses committed in the officer's presence, such an arrest after the offense is completed is proper if made within a reasonable time or upon fresh and immediate pursuit. 5 Am Jur 2d, Arrest §33. It has been held that the right to make warrantless arrests is broader in felony cases than in misdemeanor cases. Chaney v. State (1975), 133 Ga.App. 913, 213 S.E.2d 68.

Defendant's attempt to invalidate his arrest on the basis of this time argument must fail. What the officer overheard on the telephone led him to reasonably believe that the defendant was presently committing an offense. The warrantless arrest pursuant to that belief minutes later was proper regardless of whether or not the existing circumstances required immediate arrest. The arrest being lawful, the items of evidence acquired pursuant to that arrest were properly admitted at trial.

The defendant contends that the affidavit in support of application for leave to file information was insufficient. Section 46-11-201 (1), MCA, provides:

> "The county attorney may apply directly to the district court for permission to file an information against a named defendant. The application must be by affidavit supported by such evidence as the judge may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant the judge shall grant leave to file the information, otherwise the application

shall be denied."

The Revised Commission Comment states, in pertinent part:

> "Obtaining leave to file an information is not a mere perfunctory matter, but rests in the sound discretion of the district judge. The application must be complete in itself, and contain such salient facts as will allow the district judge to make an independent determination that an offense has been committed. It is impossible to delineate here what facts would be necessary for all cases; however, a recitation of the fact the defendant had been arrested, that he was accused of a crime, and that there is good evidence (e.g. eyewitnesses) implicating him with the crime would seem sufficient."

The foregoing statute and commission comment supply the test by which we measure whether an affidavit is sufficient to make possible an independent determination of probable cause by the District Court. State ex rel. Murphy v. McKinnon (1976), 171 Mont. 120, 556 P.2d 906. "Examination of the record reveals no supporting evidence other than the amended affidavit [was required by the judge under §46-11-201(1), MCA]. Thus, in determining whether probable cause existed this Court is confined to the contents of the amended affidavit." *Murphy*, 171 Mont. at 124.

The defendant points to the fact that certain statements used in the affidavit were later suppressed on defendant's motion. It is contended by the defendant that without those statements the affidavit is insufficient. We do not agree.

The affidavit with the offending portions excised, reads:

> "ARTHUR W. AYERS, JR., being first duly sworn, upon oath, deposes and says:

> "That he is the duly elected, qualified and acting County Attorney of Carbon County, Montana; that on February 12, 1978, at approximately 6:26 P.M. a telephone call was received by the dispatcher at the Carbon County Sheriff's office; that the dispatcher heard a disturbance on the other end of the telephone line and handed the telephone to Red Lodge City Police Officer Craig Christie; that Officer Christie heard a male voice at the other end of the telephone line state: 'Mamma, Mamma, die you bitch, God damnit die, are you going to die or not, die damnit, I'm going to hell'; that a male person at the other end of the telephone line then attempted to use the telephone and Officer Christie inquired as to the person's name and the address and was advised 'Grant Hamilton' and '207½ North Platt'; that Carbon County Deputy Sheriff Bert J. Obert and Officer Christie then proceeded to 207½ North Platt in the city of Red Lodge and discovered the defendant Edwin Grant Hamilton at such residence together with Mabel Johnson who appeared to said officers to be deceased; that at 7:35 P.M. Mabel Johnson was pronounced dead by a physician at her said residence 207½ North Platt, Red Lodge, Montana, which residence was shared by her son, the defendant Edwin Grant Hamilton and no others; that the cause of death of Mabel Johnson has been pathologically determined to be manual strangulation;... and that there is therefore probable cause to believe that on or about February 12, 1978, in the City of Red Lodge, County of Carbon, State of Montana, Edwin Grant Hamilton then and there purposely or knowingly caused the death of Mabel Johnson by strangling."

A prima facie showing that defendant committed an offense is not necessary in an affidavit in support of leave to file; a mere probability is sufficient for probable cause. State v. Miner (1976), 169 Mont. 260, 546 P.2d 252. "[J]udges reviewing such affidavits should use their common sense in determining whether probable cause exists." *Miner*, 169 Mont. at 264, 546 P. 2d at 255.

Defendant here argues that the affidavit is deficient because "there is no contention that other persons did not have access to the house wherein the deceased was found dead" and because the affidavit gives no reason "to believe that the appellant did not leave the premises during the day or that any other persons did not visit the residence" on the day of the crime. Defendant can cite no authority that the absence of these allegations is fatal. As with the illegal arrest issue, defendant's contentions here ignore the fact that evidence to establish probable cause need not be as complete as evidence to establish guilt. A common sense reading of the affidavit, even with the matters deleted to which defendant objected, indicates that the statutory and decisional guidelines were more than adequately met by the affidavit.

The defendant contends that evidence of the telephone call received by the Red Lodge Police Department on the night in question was inadmissible because there was no proper authentication or identification as a condition precedent to admissibility. The defendant argues that there is no inherent reliability to the evidence that the speaker who identified himself over the phone to the police officer as Grant Hamilton was in fact the defendant. Rule 901, Mont. R.Evid., provides in pertinent part:

> "(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is

> support a finding that the matter in question is what its proponent claims.
>
> "(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> .....
>
> "(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigend at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone."

As a general rule, "[a]uthenticity for admissibility can be demonstrated by direct or circumstantial evidence and the sufficiency of evidence for a foundation is within the discretion of the trial judge." State v. Cooper (1972), 161 Mont. 85, 92, 504 P.2d 978. Specifically regarding telephone calls, "many criminal cases have held or recognized that a mere statement of his identify by the caller on the telephone is not sufficient proof of such identify," but on the other hand a huge number of cases take the position that "the identity of a participant in a telephone conversation may be established by circumstantial evidence." Annot. 79 ALR3d 79, §§19, 20.

A similar issue was presented in Churchill v. State (Tex. Crim.App. 1958), 317 S.W.2d 541. In *Churchill*, the testi-

mony of a deputy sheriff that he had a telephone conversation with a person who gave his name as defendant, who reported a shooting and instructed officers to meet him at a certain place, the scene of the shooting, was admissible in evidence when further testimony showed that deputies were immediately dispatched to the scene and found defendant there. The fact that the deputy was not familiar with the defendant's voice went to the weight rather than to the admissibility of the testimony.

Where the recipient of a call is not familiar with the caller's voice, "[c]orroboration of a statement of identity by the caller sufficient to render the conversation admissible against him may be supplied by the evidence (1) that the subject matter of the call revealed that only the named party would likely have knowledge of those conversational facts; or (2) of other confirming circumstances which make it probable that the named person was, in fact, the speaker." [Citations omitted.] State v. Marlar (1972), 94 Idaho 803, 498 P.2d 1276, 1277.

Circumstances preceding or following a telephone conversation may serve to sufficiently identfy the caller so as to render telephone communication admissible. State v. Williamson (1972), 210 Kan. 501, 502 P.2d 777. "The completeness of the identification goes to the weight of the evidence rather than to its admissibility, and the responsibility lies in the first instance with the District Court to determine within its sound discretion whether the threshold of admissibility has been met." *Williamson*, 502 P.2d at 780.

Defendant's contention here that evidence of the phone conversation should have been excluded because it did not fall within Rule 901 (b) (6), Mont.R.Evid., is erroneous because the conditions stated therein are examples only. In this case there are several confirming circumstances mak-

ing it probable that defendant was in fact the speaker. There was no error in the denial of defendant's motion in limine.

The defendant alleges as error the District Court's failure to instruct on negligent homicide as a lesser included offense.

Section 46-11-501(2)(a), MCA, defines "included offense" as an offense which occurs when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged..." While this definition is applicable to double jeopardy or former prosecution as a bar to a new prosecution, it also applies where we must determine whether an instruction on a supposed lesser included offense is required. In the instant case the defendant was charged with deliberate homicide. Section 45-5-102, MCA. The refused requested instruction dealt with negligent homicide. Section 45-5-104, MCA. The difference between the two crimes consists of the mental state necessary to convict a defendant of the respective crimes. For purposes of the following discussion we will assume that negligent homicide is a lesser included offense of deliberate homicide.

The question of the necessity of an instruction on a lesser included offense has been addressed in a number of recent cases by this Court. We have consistently held that such an instruction is required where there is some evidence to support the lesser offense. "[A] defendant is entitled to instructions on lesser included offenses if *any* evidence exists in the record which would permit the jury to rationally find him guilty of a lesser offense and acquit him of a greater." State v. Ostwald (1979), _____ Mont. _____, 591 P.2d 646, 651, 36 St.Rep. 442, 448.

This test has been consistently applied by this Court. See State v. Baugh (1977), 174 Mont. 456, 571 P.2d 779, 34

St.Rep. 1315; State v. Bouslaugh (1978), _____ Mont. _____, 576 P.2d 261, 35 St.Rep. 319; State v. Radi (1978), _____ Mont. _____, 578 P.2d 1169, 35 St.Rep. 489; State v. Reiner (1978), _____ Mont. _____, 587 P.2d 950, 35 St.Rep. 1861.

In the *Reiner* case, the defendant pointed a firearm at several people and was subsequently convicted of aggravated assault. The defendant had asked for an instruction on the lesser included offense of assult and had been refused. Under this set of facts the apprehension of serious bodily injury by the victims was determinative. See section 45-5-202(c). This Court refused to overturn the conviction, saying:

> "There *may* be cases in which pointing a firearm or threatening another with a firearm could constitute assault rather than aggravated assault but we are not called upon here to say what those circumstances might be. In this case it is clear apprehension of serious bodily injury by his menacing use of a .357 magnum revolver." _____ Mont. _____, 587 P.2d at 958.

We are faced with a similar case. There is testimony in the record that death by manual strangulation requires two to three minutes, and longer if the victim struggles. In refusing the instruction, the District Court judge stated, "Well since the defense of negligent homicide is beyond my wildest imagination...I am going to refuse Defendant's..." instruction. Likewise, this Court cannot conceive how this death occurred as a result of negligence. We find no evidence in the record upon which an instruction of negligent homicide could be based. It was not error to refuse such an instruction.

Defendant contends the trial court erred in refusing defendant's offered instruction No. 34, which said:

> "You are instructed that if a person is assaulted in such a way as to induce in him a reasonable belief of danger of losing his life or suffering bodily harm, or that his family or a member thereof may suffer bodily harm, or another may suffer bodily harm, or his home is threatened, he will be justified in defending himself or another, though the danger be not real, only apparent."

The instruction that was given instead stated:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.
>
> "However, a person is justified in the use of force which is intended or likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself."
>
> This is language taken from section 45-3-102, MCA.

Defendant argues that because of the expert testimony regarding the intimidating effects on defendant caused by his bizarre relationship with his mother, it was essential that the jury be specifically instructed that his claim of self-defense be judged in terms of the apparent danger which he perceived and not the actual dangers which faced him. However, where counsel is "not limited under [the] instructions [given] from fairly presenting his defense to the jury, the defendant will not be heard to complain that the court failed to give the many different nuances on a theory of defense that might have been devised." State v. Collins (1978), _____ Mont. _____, 587 P.2d 1179, 35 St. Rep. 993, 1001.

The same issue was discussed in the *Reiner* case, supra. In that case we said:

> "In this instance the Court's instruction to the jury was drawn directly from the self-defense statute applicable. That statute states the jury must base its determination of the self-defense claim upon the *defendant's reasonable belief* of the need to use force to protect himself. While this instruction does not make the concept of apparent danger absolutely clear, neither does it misstate the law of self-defense. Under these circumstances the better practice may be to clearly instruct that the defendant's claim must be judged in terms of the apparent danger which he perceived, and not the actual danger which faced him. Yet the instruction given in this case cannot be considered so misleading as to require a new trial. We must assume that the jury did consider defendant's *belief* in the need to use force and whether that belief was reasonable. This is all the statute requires." 587 P.2d 1950, 35 St.Rep. at 1869.

The *Reiner* case controls. It was not reversible error to refuse the defendant's offered instruction No. 34.

Finally, the defendant contends that the giving of the following instruction to his jury constitutes reversible error.

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

Defense counsel made an objection to this instruction:

> "...Nowhere in the Montana Criminal Code is a statement that says that you can presume what that offered instruction says; that is in violation of the requirement that the State must prove by competent evidence each and every material allegation

> and here there is a presumption that would not require the standard test beyond a reasonable doubt."

In a recent United States Supreme Court case it was held that an instruction which was given to the jury and which was identical to the above instruction, constituted reversible error. Sandstrom v. Montana (1979), 442 U.S. _____, 99 S.Ct. 2450, 61 L Ed 2d 39.

The Supreme Court came to this conclusion by analysing the instruction "the way in which a reasonable juror could have interpreted the instruction." They went on to say:

> "Given the common definition of 'presume' as 'to suppose to be true without proof,' Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways."

The first way the instruction may have been interpreted by the jury was an irrebutable direction rather than a presumption. The second way was explained as follows:

> "...the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence—thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways. (Citations omitted.) And although the Montana Supreme Court held to the contrary in this case, Montana's own Rules of Evidence expressly

state that the presumption at issue here may be overcome only 'by a preponderance of evidence contrary to the presumption.' Montana Rules of Evidence 301 (b) (2). Such a requirement shifts not only the burden of production, but also the ulitmate burden of persuasion on the issue of intent.

"We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant come forward with 'some' evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid." 442 U.S. at _____, 99 S.Ct. at _____, 61 L Ed 2d at 47-48.

A state must prove beyond a reasonable doubt every element of the crime charged. In re Winship (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L Ed 2D 368. In *Sandstrom* the State had to prove that the crime was committed purposely or knowingly. Section 45-5-102, MCA. The United States Supreme Court concluded that under either interpretation the instruction relieved the state of proving intent beyond a reasonable doubt, therefore, it violated defendant's guarantee of due process. If the instruction was interpreted as a conclusive presumption it would excuse the state from proving a vital element and would be unconstitutional under *Winship*, supra. If Sandstrom's jury had interpreted the presumption as merely shifting the burden

of persuasion, "it could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to defendant to prove he lacked the requisite mental state. Such a presumption was found constitutionally deficient in Mullaney v. Wilbur, 421 U.S. 684 (1975)." The Supreme Court concluded that "the judgment of the Supreme Court of Montana is reversed and remanded for further proceedings not inconsistent with this opinion." 442 U.S. at _____, 99 S.Ct. at _____, 61 L Ed 2d at 53.

This Court subsequently remanded the case to the District Court for a retrial. State v. Sandstrom (1979), _____ Mont. _____, _____ P. 2d _____, 36 St.Rep. 2099.

The State contends that the instruction was harmless error under the facts of this case. We agree.

The present case began with a phone call to the Carbon County sheriff's office. An officer heard what sounded like a struggle between a male and female. There was scuffling and a female voice calling for help. After hearing what sounded like the female gasping for air and choking, the officer began to write down the intelligible words and sentences he could make out. He recorded the following phrases spoken at intervals by the male voice:

"Goddamnit, die. I am going to hell. Mamma, I am sorry. You all right, Mamma, huh? No, no, no, Mamma. I love you. Mamma, Mamma, Mamma, Like hell I am. I have never done this in my life. Now I have got to find my glasses. Mamma, Mamma, Die, you bitch. Goddamnit, die. Are you going to die or not? Die, Damnit. I am going to hell, Mamma."

Minutes later, law enforcement officers arrived at the

defendant's home and found him with bruises and scratches on his face. His 75 year old mother was lying face down on the floor. She had been manually strangled to death.

These facts were testified to at trial.

In order for a federal constitutional error to be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. California (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L Ed 2d 705. The *Chapman* decision was based upon the earlier decision of Fahy v. Connecticut (1963), 375 U.S. 85, 84 S.Ct. 229, 11 L Ed 2d 171. The court had said in *Fahy*: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87.

In Harrington v. California (1969), 395 U.S. 250, 89 S.Ct. 1726, 23 L Ed 2d 284, the Supreme Court again considered the concept of harmless error. The prosecution, during defendant's trial, had introduced the confessions of three codefendants. Two of the codefendants did not take the stand. This practice had been held to be a denial of Sixth Amendment rights in Bruton v. United States (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L Ed 2d 476. In *Harrington*, however, the Court held that the practice could, under the facts of the case, be held as harmless error. The Court said:

> "But apart from them [the confessions] the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* (386 U.S. at 42-45) that a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evidence.

> "It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. *Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury.* We admonished in *Chapman*, 386 U.S., at 23, against giving too much emphasis to 'overwhelming evidence' of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless. By that test we cannot impute reversible weight to the two confessions.
>
> "We do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed." 395 U.S. at 254. (Emphasis added.)

In Milton v. Wainwright (1972), 407 U.S. 371, 92 S.Ct. 2174, 33 L Ed 2d 1, the Supreme Court again considered the harmless error doctrine. The Court said that there was overwhelming evidence of guilt and that there was "no reasonable doubt that the jury....would have reached the same

verdict without hearing [the tainted] testimony." 407 U.S. at 377. Consequently, defendant's conviction was affirmed.

The tests used in *Harrington* and *Milton* seemingly are different. The *Harrington* test focuses on the impact upon the jury. The *Milton* test focuses upon the amount of evidence presented at the trial or the "overwhelming evidence" test. See Boy, Harmless Error: The Need For a Uniform Standard, 53 St. John's L.R. 541 (1979).

Recently, this Court has made the following observation: "To constitute harmless error, we must be able to assent as a Court that the offensive instruction could not reasonably have contributed to the jury verdict." State v. *Sandstrom* (1979), _____ Mont. _____, at _____, 603 P.2d 244, at 245, 36 St. Rep. 2099, 2100. This statement indicates that the law in Montana as to harmless error is closer to the *Harrington* test. That is, the appellate court determines the impact of the error upon a reasonable jury. If the impact of the instruction could not have reasonably contributed to the verdict, then the error is harmless. That such an approach is correct is emphasized by the United States Supreme Court. They said that the proper analysis of an instruction begins with "the way in which a reasonable juror could have interpreted the instruction." 442 U.S. at _____, 99 S.Ct. at _____, 61 L Ed 2d at 45.

Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. Section 45-5-102, MCA. Therefore, these elements ae necessary to the proof of this particular crime, and must be proved beyond a reasonable doubt by the prosecution.

For obvious reasons, intent is a difficult element to prove. The evidence must normally be in the nature of outward manisfestations of the defendant's state of mind. In

present case, however, we have a unique situation. We know what the defendant was thinking. A police officer heard him say, among other things:

"Goddamnit, die....Die you bitch. Goddamnit, die.

Are you going to die or not? Die, Damnit...."

It is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken and another officer found the defendant and the victim's body minutes later.

For purposes of this issue, the only contested element is intent. The evidence as to intent is overwhelming. We have carefully read the record and our holding is based upon the probable impact of the instruction upon the minds of the average jury. In the light of the evidence, the impact of the instruction upon the jury could not have reasonably contributed to the verdict. The error was harmless.

Affirmed.

FRANK I. HASWELL, C.J., and GENE B. DALY, JOHN CONWAY HARRISON, DANIEL J. SHEA, and JOHN A. SHEEHY, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14677
D.C. #1412

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the Thirteenth Judicial District, in and for the County of Carbon. Greeting:

WHEREAS, In the said District Court in a cause between State of Montana, Plaintiff and Respondent, and Edwin Grant Hamilton, Defendant and Appellant, wherein the Judgment of the said District Court, entered in said cause on the 28th day of September A.D. 1978 was in favor of the said Plaintiff and Respondent and against the said Defendant and Appellant as by the inspection of the transcript of the record of said Court in said cause which was brought into the Supreme Court of said State by virtue of an appeal, agreeably to the statute of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

AND WHEREAS, in the June term of court in the year of our Lord, one thousand nine hundred and seventy-nine said cause came on to be heard before said Supreme Court and was argued by counsel.

WHEREUPON, On consideration, it is now here ordered and adjuged by this Court that the Judgment of the Court below, entered in this cause on the 28th day of September A.D. 1978 if (sic) affirmed.

Costs in this Court:
Appellant Appearance - none
Respondent Appearance - none
Remittitur none

January 17 A.D. 1980

You, THEREFORE, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, non inconsistent with the opinion hereto attached.

WITNESS: The Honorable Frank I. Haswell, Chief Justice of the Supreme Court of the State of Montana, this 30th day of January A.D. 1980.

THOMAS J. KEARNEY, Clerk of the Supreme Court of the State of Montana.

APPENDIX C

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF CARBON

No. 1412

THE STATE OF MONTANA,

Plaintiff

v.

EDWIN GRANT HAMILTON,

Defendant.

Defendant, EDWIN GRANT HAMILTON, having been convicted in this Court under a jury verdict of guilty of the crime of Mitigated Deliberate Homicide, a felony, committed in the County of Carbon, State of Montana, it is ADJUDGED and DECREED that the defendant is guilty of the offense, and

The Court ORDERS that the defendant be imprisoned in the Montana State Prison for a term of thirty-five (35) years, and that the defendant receive credit for time served in the Carbon County Jail from and including February 12, 1978, to and including September 28, 1978.

DATED this 28th day of September, 1978.

ROBERT H. WILSON, District Judge

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14677

STATE OF MONTANA,

Plaintiff and Respondent,

v.

EDWIN GRANT HAMILTON,

Defendant and Appellant.

ORDER

PER CURIAM:

The above-entitled cause having been argued and submitted to the Court for decision on June 5, 1979, and taken under advisement,

And thereafter, on June 18 the United State Supreme Court having rendered a decision in case in our cause No. 14064, entitled David Sandstrom v. Montana in that Court, wherein an instruction that "the law presumes that a person intends the ordinary consequences of his volun-

tary acts" was declared unconstitutional and the conviction reversed,

And wheres a similar instruction was given in this cause, objected to by the defendant, but not assigned as error on appeal,

And whereas this Court desires submission of briefs concerning said instruction in the light of Sandstrom v. Montana,

IT IS ORDERED:

1. Appellant is granted thirty (30) days from the date hereof in which to prepare, file and serve a statement of this additional issue and a supplemental brief theron; respondent is granted thirty (30) days thereafter in which to file an answer brief; and appellant is granted fifteen (15) days thereafter in which to file a reply brief.

2. On receipt of the foregoing briefs, this Court will determine whether oral argument will be granted or whether the issue will be deemed submitted on briefs only.

3. The Clerk is directed to mail a true copy of this order to counsel of record for the respective parties and to the Attorney General of the State of Montana.

DATED this 12th day of July, 1979.

FRANK I. HASWELL, Chief Justice, GENE B. DALY, JOHN CONWAY HARRISON, and JOHN A. SHEEHY, Justices.

Supreme Court, U. S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

—o—

No. 79-1701

—o—

EDWIN GRANT HAMILTON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

MICHAEL T. GREELY
Attorney General
State of Montana

State Capitol
Helena, Montana 59601
(406) 449-2026

Counsel for Respondent

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Reasons Why the Writ Should Be Denied 2

1. The question presented in the petition is not sufficiently important to warrant this Court's review. 2

2. The result below was correct. 3

Conclusion 5

CITATIONS CITED

CASES:

Chapman v. California, 386 U. S. 18, 24 (1967) 3

Harrington v. California, 395 U. S. 250, 254 (1969) 3

Sandstrom v. Montana, 99 S. Ct. 2450 (1979) 2, 3

State v. Caryl, 168 Mont. 414, 426-28, 543 P. 2d 389, 396-97 (1975) 2

State v. Freeman, — Mont. —, 599 P. 2d 368, 373-74 (1979) 5

State v. Sandstrom, — Mont. —, 603 P. 2d 244 (1979) 3

State v. Sandstrom, — Mont. —, 580 P. 2d 106, 107-08 (1979), rev'd, 99 S. Ct. 2450 (1979) 3

State v. Sunday, 37 S. Rptr. 561 (Mont. 1980) 5

CITATIONS—Continued

	Pages
STATUTES:	
§ 45-3-102 Montana Code Annotated	4
§ 45-5-102 (1) (a), Montana Code Annotated	5
§ 45-5-130, Montana Code Annotated	5
TEXTS:	
M. Bassiouine, Substantive Criminal Law at 472 (1978)	5
Perkins, *Self-Defense Re-Examined,* 1 U. C. L. A. L. Rev. 133, 133 n. 6 (1954)	5

In The

Supreme Court of the United States

October Term, 1979

No. 17-1701

EDWIN GRANT HAMILTON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of Montana respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Montana Supreme Court's opinion in this case. That opinion is reported at 605 P. 2d 1121.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The question presented in the petition is not sufficiently important to warrant this Court's review.

The decision of the Montana Supreme Court below turns upon the peculiar facts of this case alone. The court below stated as much: "In the present case, however, we have a unique situation." Because a phone call had been made to the police department from the defendant's residence prior to or during the altercation resulting in the victim's death, a police officer heard the defendant's statements during the struggle, including these: "Goddamnit, die. . . . Die you bitch. Goddamnit, die. Are you going to die or not? Die, Damnit. . . ." The Montana court based its holding on a "careful read[ing of] the record," and reached its conclusion "[i]n the light of the evidence." 605 P. 2d at 1132-33. Now the petitioner is asking this Court to again examine all of the evidence, including the unique factual situation presented, and determine if "[t]he Montana Supreme Court err[ed] . . . under the facts of this case." Petition at 3. Because those facts are unlikely to recur, this Court's determination would affect only the defendant in this case.

The jury instruction challenged in this case, which had been approved by the Montana Supreme Court at the time of defendant's trial, *State v. Caryl,* 168 Mont. 414, 426-28, 543 P. 2d 389, 396-97 (1975), was declared unconstitutional by this Court nearly one year ago. *Sandstrom v. Montana,* 99 S. Ct. 2450 (1979). The instruction is no longer given. Any question concerning its harmlessness is unlikely to arise in the future. Consequently, the issue

is not sufficiently important to warrant this Court's review.

2. The result below was correct.

The Montana Supreme Court correctly applied the test for harmless constitutional error, set forth in *Chapman v. California,* 386 U. S. 18, 24 (1967), and *Harrington v. California,* 395 U. S. 250, 254 (1969), to the facts of this case, and declared its belief that the error in giving the challenged instruction was harmless beyond a reasonable doubt.

This Court's decision in *Sandstrom v. Montana, supra,* 99 S. Ct. 2450, did not preclude such a determination of harmless constitutional error. That issue was specifically left open for consideration by the state court. 99 S. Ct. at 2460-61. The state court did consider that issue on remand, finding upon the evidence presented in that case that the error had not been harmless beyond a reasonable doubt. *State v. Sandstrom,* — Mont. —, 603 P. 2d 244 (1979). A comparison of the facts of that case and the instant one emphasizes the correctness of both.

In *Sandstrom,* the testimony was that the defendant stabbed the victim to "silence" her screams, but not to kill her. No other witness heard or saw the crime. *State v. Sandstrom,* — Mont. —, 580 P. 2d 106, 107-08 (1979), *rev'd, supra,* 99 S. Ct. 2450 (1979). Under these facts, an instruction requiring the jury to presume that the defendant intended the ordinary consequences of his repeated stabbing of the victim could not be harmless. In the instant case, by comparison the evidence included the statements defendant made while he was strangling the victim,

expressing his desire that she die. This evidence was uncontradicted. Under these facts, the instruction was harmless beyond a reasonable doubt.

The finding of harmlessness below is correct for another reason. Intent to cause death was not at issue in the trial of this case. The sole defense presented at trial was self-defense. *See* R. 189-91, 496; § 45-3-102 Montana Code Annotated. The extensive psychological testimony introduced by the defendant was directed not to whether he intended to cause the victim's death, but rather why he intended to do so. *See* R. 490-514. The petition indicates that defendant's crucial witness was Dr. Tranel, the clinical psychologist. Petition at 12-13. His direct testimony concluded with these final statements:

> Q. [C]ould Mr. Hamilton have reasonably been placed in fear for his life?
>
> A. Yes, at that point he would have likely concluded that the impending threat required a defensive reaction on his part in order to preserve his integrity.
>
> Q. Could he have reasonably believed that it was either he or the aggressor at that time?
>
> A. Oh, yes.
>
> Mr. Kampfe: No further questions.

R. 513-14.

Even Dr. Tranel, the crucial defense witness, assumed that the defendant intended to cause the victim's death. Under these circumstances, the instruction to the jury was harmless error.

The presumption instruction did not affect the petitioner's defense by requiring the jury to discount Dr. Tranel's testimony. An intent to kill is not only compatible with the defense of self-defense, but is necessarily contained within it. "[S]elf-defense admits a purposeful act, but claims the purposeful act was justified." *State v. Sunday,* 37 S. Rptr. 561 (Mont. 1980). The jury's verdict of guilty of the lesser offense of mitigated deliberate homicide (§ 45-5-130, Montana Code Annotated) rather than deliberate homicide (§ 45-5-102 (1) (a), Montana Code Annotated) means the jury did in fact consider the psychologist's testimony in mitigation. The jury must have accepted the testimony that the defendant acted out of a genuine belief his life was endangered, but rejected the contention that such a belief was reasonable. *See generally State v. Freeman,* — Mont. —, 599 P. 2d 368, 373-74 (1979); M. Bassiouine, Substantive Criminal Law at 472 (1978); Perkins, *Self-Defense Re-Examined,* 1 U. C. L. A. L. Rev. 133, 133 n. 6 (1954). The instruction given requiring the jury to presume the intent to kill did not affect defendant's sole defense and was therefore harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL T. GREELY
Attorney General
State of Montana

State Capitol
Helena, Montana 59601
(406) 449-2026

Counsel for Respondent